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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 986

STERLING ALUMINUM PRODUCTS COMPANY, INC.,
Petitioner,

vs.

SHELL OIL COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN S. MARSALEK,
Attorney for Respondent.

MOSER, MARSALEK & DEARING,
Of Counsel.

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INDEX.

Page

Respondent's statement 1

Summary of argument, with authorities..... 3

Argument 4

I. In Missouri, damages for death are not recoverable in a suit for breach of contract, and the Circuit Court of Appeals correctly so held..... 4

II. The case of London Guarantee and Accident Company v. Strait Scale Company, 322 Mo. 502, relied upon by petitioner, does not apply because the right to recover for the death involved in that suit was governed by Minnesota law..... 8

Cases Cited.

Bloss v. Dr. C. R. Woodson Sanitarium Co. et al., 319 Mo. 1061, 5 S. W. 2d 367.....3, 6, 7, 8

Braun v. Riel (Mo. Sup.), 40 S. W. 2d 621, 80 A. L. R. 875 ..... 3, 8

Keiper v. Anderson et al., 138 Minn. 392, 165 N. W. 237 ..... 3, 9

Statutes Cited.

Minnesota statute governing damages for death, Section 8175, Minnesota G. S. 1913..... 3

Missouri statutes governing damages for death, Sections 3652, 3653, Revised Statutes of Missouri 1939, ...3, 4, 5, 6

Missouri Workmen's Compensation Act, Revised Statutes of Missouri 1939, Chapter 29, Sections 3689-3766 2

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RESPONDENT'S STATEMENT.

In 1935 petitioner, Sterling Aluminum Products Company, commenced using a product of respondent, Shell Petroleum Company, known as "Shell solvent, code No. 8195" for the testing of motor blocks under pressure (R. 2). In May, 1940, while one of petitioner's employes was engaged in this work, a freeze plug blew out of the motor block and shattered an electric light globe. A fire resulted, in which the employee lost his life (R. 37, 121).

Petitioner paid the employe's dependent $4,000 under the requirements of the Missouri Workmen's Compensation Act (R. S. Mo. 1939, Secs. 3689-3766) and sued to recover the loss from respondent. The suit was based upon an alleged breach of warranty, the petition alleging that respondent had warranted its product to be non-inflammable, but that on the occasion of the injury to its employe, the solvent escaped from the motor block, spread upon his clothing, and became ignited, causing his death (R. 3). The making of the alleged warranty was denied by respondent, and this issue was strongly contested at the trial, which resulted in a jury verdict for respondent.

At the close of petitioner's evidence at the trial (R. 45), and again at the close of all the evidence (R. 91), respondent moved for a directed verdict in its favor, assigning as ground therefor, among others, that under the law of Missouri damages arising from death could not be recovered in an action for breach of contract. On petitioner's appeal to the Circuit Court of Appeals the Court sustained this contention of respondent and affirmed the judgment (R. 126).

SUMMARY OF ARGUMENT.

(1)

The purpose of petitioner's suit was to reimburse itself for money paid to the dependent of its deceased employe as a result of the death of the employe. The accident and the death of the employe occurred in the State of Missouri. Petitioner's alleged right of recovery stems from and is bottomed upon the employe's death. No right of action for death is conferred by the common law, and there is no statute of Missouri giving a right of action for death based upon breach of warranty or contract, such right, under Missouri statutes and decisions, being limited to tort actions. The Circuit Court of Appeals correctly so held.

Sections 3652, 3653, Revised Statutes of Missouri 1939;
Bloss v. Dr. C. R. Woodson Sanitarium Co. et al., 319 Mo. 1061, 5 S. W. (2d) 367;
Braun v. Riel (Mo. Sup.), 40 S. W. (2d) 621, 80 A. L. R. 875.

(2)

The case of London Guarantee and Accident Co. v. Strait Scale Co., 322 Mo. 502, relied upon by petitioner, does not apply to the present case. The accident and death there involved occurred in Minnesota, where the law permits an action arising out of death to be maintained *ex contractu*. The point involved in the present case was not ruled upon or even presented to the Missouri Supreme Court in the London Guarantee case.

Section 8175, Minnesota General Statutes 1913;
Keiper v. Anderson et al., 138 Minn. 392, 165 N. W. 237, L. R. A. 1918 C, 299.

ARGUMENT.

The payment for which petitioner sought reimbursement in its suit was one it was obliged to make because of the death of its employee. The causative factor, the event which set in motion the chain of circumstances resulting in this litigation, was the death of the employe, and consequently petitioner's action stemmed from and was bottomed upon that event. The theory of the action was that, by virtue of an alleged breach of warranty, respondent was liable for the employe's death, and consequently was liable to the petitioner for the loss petitioner sustained as a result of the death. Under the common law, no action lies to recover damages arising out of the death of a human being, and it devolved upon petitioner to establish such a right under some statute of the state. Only two statutes of Missouri, Sections 3652 and 3653, Revised Statutes of Missouri 1939, create rights of action for death. Section 3652 provides:

> "Whenever any person, including any employee of the corporation, individual or individuals hereinafter referred to whose death is caused by the negligence of a coemployee thereof, shall die from any injury resulting or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car or train of cars, or any street electric or terminal car or train of cars, or of any master, pilot, engineer, agent or employee whilst running, conducting or managing any steamboat, or any of the machinery thereof, or of any driver of any stage coach, automobile, motor car or other public conveyance whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, whether the same be a steam, street, electric or terminal railroad or any part thereof, or in

any locomotive, car, street car, electric car, or terminal car, or in any steamboat, or the machinery thereof, or in any stage coach, automobile motor car, or other public conveyance, the corporation, individual or individuals in whose employe any such officer, agent, servant, employee, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns, operates or conducts any such railroad, locomotive, car, street car, electric car, terminal car, automobile motor car, stage coach, or other public conveyance at the time any injury is received resulting from or occasioned by any defect or insufficiency, unskillfulness, negligence, or criminal intent above declared, or any such officer, agent, servant, employee, master, pilot, engineer or driver, whose negligence, unskillfulness, or criminal intent shall cause such injury, shall forfeit and pay as a penalty, for every such person, employee or passenger so dying, the sum of not less than two thousand dollars, and not exceeding ten thousand dollars, in the discretion of the jury, * * * and such corporation, individual or individuals or such officer, servant, agent, employee, master, pilot, engineer, or driver, may show as a defense that such death was caused by the negligence of the deceased. In suits instituted under this section, it shall be competent for the defendant, for his defense, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency, and that the injury received was not the result of unskillfulness, negligence or criminal intent. Every person who shall have cause of action for any death through the negligence, unskillfulness, or criminal intent of any servant, under the provisions of this section, may, at his option, bring suit thereon jointly against the master and servant, or severally, against either master or servant."

And Section 3653 provides:

"Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and

the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

Clearly section 3652 is without application to the facts of this case. Does section 3653 authorize an action of this character? That this question must be answered in the negative is conclusively established by the decision of the Missouri Supreme Court in Bloss v. Dr. C. R. Woodson Sanitarium Co. et al., 319 Mo. 1067, 5 S. W. (2d) 367. There plaintiff sought to recover damages in the amount of $20,000.00 for the death of her husband, who had suffered from a nervous malady accompanied by a suicidal tendency or mania, and while under treatment in defendants' sanitarium had hanged himself. In plaintiff's petition it was charged that the defendants contracted with her to accept custody of her husband as a patient, to provide him with living quarters and accommodations, to treat him and to guard him against the dangers incident to his disease, of which disease defendants were aware, but that defendants "in violation of their said contract with plaintiff, and contrary to the representations and promises made at the time her said husband was placed as a patient with defendants," did not guard and protect her husband, and as a result of defendants' neglect to perform their obligation the self-destruction occurred. Defendants demurred to the petition, the grounds of the demurrer being: (1) that the petition did not state a cause of action; (2) and that the action was barred by limitation. The demurrer was sustained by the trial court and plaintiff appealed. The suit was not instituted until more than a year and a half after the death of plaintiff's husband,

whereas Section 4221, R. S. Mo. 1919 (now Section 3656, R. S. Mo. 1939), requires actions for death to be commenced within one year after the accrual of the cause of action. To avoid the bar of the statute plaintiff contended the action was one ex contractu and not governed by it. Defendants' answer to that contention was that if the action was one on contract the petition did not state a good cause of action because no action for wrongful death could be maintained except under the statute (Section 4218, R. S. Mo. 1919, now Section 3653, R. S. Mo. 1939). The Supreme Court of Missouri affirmed the judgment of the lower court. We quote from the opinion:

> "Treating the action as one on contract, in harmony with appellant's construction of the pleading, we are still clearly of the opinion that the demurrer was well ruled.
>
> * * * * * * *
>
> "The contract pleaded was not one with the deceased. It was an engagement directly between the appellant and the respondents, and the point to be determined is whether she, as obligee, can maintain this suit on her contract for damages for his wrongful death.
>
> "The law is to the contrary. As was said in Bates v. Sylvester, 205 Mo. 493, 499, 104 S. W. 73, 74 (120 Am. St. Rep. 761, 12 Ann. Cas. 457):
>
> " 'At common law the death of a human being gave rise to no civil action in behalf of any person under any circumstances as has often been decided by the appellate courts of this state.'
>
> "To the same effect is Gilkeson v. Mo. Pac. R. Co., 222 Mo. 173, 185, 121 S. W. 138, 24 L. R. A. (N. S.) 844, 17 Ann. Cas. 763, where it is declared, quoting from Mobile Life Ins. Co. v. Brame, 95 U. S. 754, 756, 24 L. Ed. 580:
>
> " 'The authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death, that

it is impossible to speak of it as a proposition open to question.'

"See also, 8 R. C. L., p. 719; § 15; 17 C. J., p. 1181, § 36.

"Some of the cases put it that the death of a human being could not be complained of in a civil court as an injury, or that no private action (as distinguished from a criminal prosecution) for wrongful death was maintainable, but whatever the form of expression used it is not to be doubted that the rule applied to actions ex contractu as well as actions ex delicto."

The Court further said that the doctrine in Missouri always has been that the wrongful death statutes confer a cause of action *ex delicto*, not one *ex contractu*.

The decision in the Bloss case was referred to with approval by the same court in Braun v. Riel, 40 S. W. (2d) 621, 622, 80 A. L. R. 875, 879. The Braun case, however, was construed to be an action ex delicto and not one ex contractu.

We respectfully submit that the foregoing decisions of the Supreme Court of Missouri are controlling in this case.

Petitioner relies upon London Guarantee & Accident Company, Ltd., of London, England, v. Strait Scale Company, 322 Mo. 502, 15 S. W. (2d) 766, 64 A. L. R. 936. An examination of the case will show that it does not militate against respondent's contention for two reasons; (1) While it is true the damages recovered by plaintiff included the loss sustained by its subrogor as a result of the death of an employe of the railroad company for which the subrogor constructed the coaling station, the point now before this Court was not raised by defendant nor decided by the Court; and, (2) the accident causing the death and the death itself occurred in the State of Minnesota, and an action for death arising from a breach of contract can be maintained under the death statute of

that state. The Minnesota statute in effect at the time of the accident and death involved in the London Guarantee & Accident Company case was Section 8175, Minnesota General Statutes 1913, Vol. 2, and provided:

> "When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission. * * *"

In Keiper v. Anderson et al., 138 Minn. 392, 165 N. W. 237, L. R. A. 1918 C 299, an action to recover for the death of plaintiff's husband, alleged to have resulted from illness contracted by him because of the failure of his landlord, the named defendant, to comply with the terms of a lease requiring the proper heating of a storeroom occupied by the deceased, the Supreme Court of Minnesota held that, under the provisions of the foregoing section, an action to recover for death resulting from a breach of contract could be maintained. We quote a portion of the opinion:

> "Defendants claim that the action will not lie because it is on contract, not in tort, and because the statutory action to recover for death caused by wrongful act or omission can be maintained only when the cause of action is in tort.
>
> "Had Keiper survived, his cause of action would have been for breach of the contract to heat the premises, as proof of the contract would have been necessary to create any cause of action. This is settled in this state. Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55; Sargent v. Mason, 101 Minn. 319, 112 N. W. 255; City of East Grand Forks v. Steele, 121 Minn. 296, 141 N. W. 181, 45 L. R. A. (N. S.) 205, Ann. Cas. 1914 C, 720; Finch v. Bursheim, 122 Minn. 152, 142 N. W. 143; Glidden v. Goodfellow, 124 Minn. 101, 144 N. W. 428, 1916 F, 1073.
>
> "It is just as true that the present action is based

on the contract; there could be no recovery except for the contract. Though negligence or wrongdoing be alleged, the action is founded on contract, and therefore classed as one, in substance, on the contract.

* * * * * * *

"Counsel for defendants insist that no action for death by wrongful act will lie unless the wrongful act or omission is a tort, negligence, unconnected with contract. They say that an act or omission is not wrongful—does not constitute negligence—unless it is a breach of some duty imposed by law, not merely one imposed by contract. They point out that the right of action given by the statute is a new and distinct right of action, not a survival of the right of action which the injured person had before his death to recover damages. This is correct under our decisions.

* * * * * * *

"We do not find support for the proposition of defendants' counsel that because the duty breached by defendants was one imposed by contract, this action will not lie."

It is evident from the above that the law of Missouri differs vitally from the law of Minnesota on the question involved in this proceeding, and that the London Guarantee and Accident case, in which the Missouri Supreme Court was ruling upon an accident and death which occurred in Minnesota, is not in point.

We submit that the opinion of the Circuit Court of Appeals in this case is not in conflict with the law of Missouri, but is in accordance therewith, and that consequently the petition should be denied.

Respectfully submitted,

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Of Counsel.